

NATURAL RESOURCES COMMISSION

July 16, 2013 Meeting Minutes

MEMBERS PRESENT

Bryan Poynter, Chair
Jane Ann Stautz, Vice Chair
Cameron Clark, Secretary
Phil French
Doug Grant
Donald Ruch
Thomas Easterly
Patrick Early
Matt Voors

NATURAL RESOURCES COMMISSION STAFF PRESENT

Stephen Lucas
Sandy Jensen
Jennifer Kane

DEPARTMENT OF NATURAL RESOURCES STAFF PRESENT

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| John Davis | Executive Office |
| Cheryl Hampton | Executive Office |
| Marty Benson | Communications |
| Linnea Petercheff | Fish and Wildlife |
| Bill James | Fish and Wildlife |
| Mark Reiter | Fish and Wildlife |
| Mitch Marcus | Fish and Wildlife |
| Luke Rains | Fish and Wildlife |
| William Seegers | Fish and Wildlife |
| Matt Buffington | Fish and Wildlife |
| John Bacone | Nature Preserves |
| Chad Slider | Historic Preservation |
| Bourke Patton | Natural Resources Foundation |
| Dan Bortner | State Parks and Reservoirs |

GUESTS PRESENT

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| Tom Hastings | Bill Herring |
| Jack Corpuz | Tim Maloney |
| Barb Simpson | Paul Arlinghaus |

Bryan Poynter, Chair, called to order the regular meeting of the Natural Resources Commission at 10:23a.m., EDT, on July 16, 2013 at The Garrison, Fort Harrison State Park, 6002 North Post Road, Ballroom, Indianapolis, Indiana. With the presence of nine members, the Chair observed a quorum.

The Chair announced Item #11 was removed from the agenda and would not be heard today.

Thomas Easterly moved to approve the minutes for the meeting held on May 14, 2013. Vice Chair Jane Ann Stautz seconded the motion. Upon a voice vote, the motion carried.

Reports of the Director, Deputies Director, and Advisory Council

Director Cameron Clark provided his report. He said the Department lost “one of its shining stars. Gary Miller passed away recently. He was 57, and it was unexpected.” He noted Miller ran the Department’s state park inns. “Our inns system is considered probably the best in the country for this industry. [Gary] is and will continue to be sadly missed.” He was employed with DNR for approximately 25 years, and he “ran a really good ship. We had a nice ceremony here...with his family and friends. It was well attended, and his family really appreciated it. Keep his family in your prayers.”

The Director reported Col. Scotty Wilson, Director of the Division of Law Enforcement, was retiring at the end of July after working for the Department for 28 years. Also, Bruce Stevens, Director of the Division of Reclamation, submitted a letter of resignation. “Scotty is retiring and is going to enjoy Florida. Bruce will be moving on to the Indiana Coal Council as Vice President in charge of mine safety. We will lose both of those guys at the end of the month.”

The Director said a new fiscal year began July 1. “We will continue to be as fiscally responsible as we can given our funds.” Governor Pence has requested all state government agencies keep a 3% reserve, “which will require some creative belt-tightening by all divisions within DNR.”

The Director said the in-lieu fee rule proposal, subject of Agenda Item 8, “is moving along well..., as well as the joint effort with INDOT, IDEM, and DNR”. The RFP for hiring a consultant to assist in formulating the joint program, which addresses Federal permits, ended today. “By now we should have all of our interested parties’ proposals in, and we will begin reviewing those within the next week trying to narrow those down to three and move those three to the interview process.”

The Director updated the Commission on a fundraising event held in Ft. Wayne to benefit Northeast Indiana. The event collected nearly \$200,000, an increase from last year’s fundraiser. “It was a tremendous night. Bourke [Patton] was instrumental in helping put that together. Bourke and folks up there deserve a real round of thanks for one night’s work of raising some pretty significant funds.”

John Davis, Deputy Director for the Bureau of Lands and Cultural Resources, provided his report. He said Governor Pence was present and cut the ribbon two weeks previously to open the Prophetstown Aquatic Center. “It has been very busy since then. It’s a very popular place and has beautiful architecture. It fits right into the park.”

Davis said in 2009 the Commission amended a nonrule policy document to close caves on DNR properties due to the Whitenose Syndrome which affects the bat population. The Department is

in discussion with the U.S. Fish and Wildlife Service, cavers, and other persons involved in this issue. “I think we are ready to open a couple of caves under pretty close supervision. We may come to you to change the nonrule policy, or at least to discuss what we are going to do that is different.” He said the Department is also progressing in many other projects, including the Goose Pond Visitor’s Center and the Pavilion reuse project at Indiana Dunes State Park.

Commissioner Easterly asked whether all caves located in Indiana were closed. Davis said all Department caves are closed, and he understood the U.S. Forest Service’s caves were also closed. “There is a theory that Whitenose [Syndrome] has infected [the Department caves] so it doesn’t do any good to close a cave. In fact, we were closed because we feared people being in caves that had Whitenose present and then coming to our caves and spreading it faster than the bats would spread it. No doubt, the bats are spreading it westward. Now we are closed for the opposite reason so that visitors, cavers in Indiana, don’t pack up their gear after being in a cave here and go to Missouri or Arizona. Chances are so slight that would be the way, but there are some jumps in this progression that look like they probably were artificial as opposed to bats.”

Chris Smith, Deputy Director for the Bureau of Water Resource and Regulation, was not present.

CHAIR, VICE CHAIR, AND CHAIR OF ADVISORY COUNCIL

Updates on Commission and Committee activities

Vice Chair Stautz reported the AOPA Committee did not meet this month, but the Committee will meet by September 17.

Patrick Early, Chair of the Advisory Council, provided his report. The Advisory Council met last month and discussed proposed rules governing the drilling of water wells. He said the Advisory Council recommended the Commission give preliminary adoption to the rules. Early also noted the Advisory Council had a lengthy discussion on the proposed rules initiating an in-lieu fee, which is set to be considered by the Commission in Item 8.

DNR, EXECUTIVE OFFICE

Consideration and identification of any topic appropriate for referral to the Advisory Council

No items were referred to the Advisory Council.

PERSONNEL ITEM

Information Item: Introduction of Luke Rains, Public Access South Manager for the Division of Fish and Wildlife

Bill James, Chief Fisheries Biologist with the Division of Fish and Wildlife, presented this item. He introduced Luke Rains, the newest Property Manager in the Fisheries Section. Rains is not the property manager of just one property, like most property managers. “He has got maybe 100

public fishing access sites and public fishing areas scattered all over the southern half of the state”. James said Rains and his heavy construction crew build, maintain, and rehabilitate access sites. Any time there is a need for heavy construction in southern Indiana on a Fish and Wildlife Area or State Fish Hatchery, Rains and his team are “there to get the job done. They also partner in a big way with the Hoosier National Forest to do wildlife projects on Federal lands, whether it be wetland construction, wildlife openings, and that sort of thing.” Rains is a native of Indiana, having grown up in the Bedford area. He attended Eastern Kentucky University, earning a degree in wildlife management. “Interestingly, while in college [Rains] worked three seasons as an intermittent laborer for us at Public Access South in the Mitchell office. So he came to us as a full-time applicant with a really good knowledge of what goes on down there.” Rains assists seasonally with wildlife research in Southern Indiana for wild turkey, grouse, and feral hogs. He was a contract laborer with the National Wild Turkey Federation working on early succession habitat projects. He “is back home in Indiana with his wife, Lindsay, and he hunts, fishes, and traps.”

The Chair asked, “How many sites are in the south that you manage”. Rains answered, “I don’t even know. There are so many of them.”

The Chair asked whether new access sites are planned. Rains said a new access site is in the process of being installed at the Bluegrass Fish and Wildlife Area, and two other access ramps located in the Washington and Petersburg area are being rehabilitated. Rains said his office is located at the Glendale Fish and Wildlife Area.

The Chair thanked Luke Rains for attending the meeting. “We wish you well. As always, Bill and all the other Division Directors do such a great job with their talents.”

DIVISION OF NATURE PRESERVES

Consideration of the dedication of the Blue Cast Springs Nature Preserve in Allen County

John Bacone, Director of the Division of Nature Preserves, presented this item. The Blue Cast Springs Nature Preserve is a high quality remnant along the Maumee River, which has a heron rookery located within the nature preserve boundary, a high quality upland oak hickory floodplain forest, and a natural spring. The spring used to be a commercial spring. Within the boundaries is a Native American small mound. Bacone said the site is owned by ACRES Land Trust. He circulated photographs of the nature preserve and then recommended its dedication as a nature preserve.

Easterly said, “I was surprised how small—particularly the next [item]—but this one, too. Is there a plan to have more, or are we going to wind up with a bunch of little pieces of property scattered all around?”

Bacone responded many of the sites are going to be pretty small. He said ACRES Land Trust owns a large field located on the southwest corner, which ACRES is reforesting, but it is not being dedicated as a nature preserve. “This is a little more blocked in than it might be. A lot of these sites, given the locations, will not have an opportunity to get much bigger.”

Easterly asked, “What is our responsibility other than dedication?”

Bacone explained that the Department would have a conservation easement on the property, and ACRES would have to adhere to the Master Plan that is part of the dedication. “We provide mostly just technical assistance. We can provide a little support with regard to some signs, but, in general, [ACRES] is fully equipped to operate and maintain the site.”

Davis asked whether the nature preserve sites owned by ACRES are open to the public. Bacone answered in the affirmative. “I think pretty much all of the preserves end up with at least one trail and one parking lot. I don’t think they have any sites that are so fragile that they are not open. I think they are all open to the public.”

Thomas Easterly moved to approve dedication of Blue Cast Springs Nature Preserve in Allen County. Donald Ruch seconded the motion. Upon a voice vote, the motion carried.

Consideration of the dedication of the Marion’s Woods Nature Preserve in Steuben County

John Bacone also presented this item. He said the proposed nature preserve is a 20-acre forest located in Angola but “is a high quality forest remnant with lots of decent depressions that provide habitat for salamanders, frogs, and other things.” Thousands of Angola citizens signed petitions and donated money to help ACRES fundraise to purchase this tract. “The developer sold [the tract] at a bargain sale realizing it was important to the local community. There is a school down the road that ACRES is working with to install a trail and provide environmental education, as well as protecting this pretty rare and high quality site.” The site is named in honor of Marion Eberhardt, a charter member and founder of ACRES Land Trust. “When she passed, her husband and some other charter members also spearheaded fundraising events to try to save the place in her honor.”

Vice Chair Stautz moved to approve dedication of Marion’s Woods Nature Preserve in Steuben County. Doug Grant seconded the motion. Upon a voice vote, the motion carried.

Consideration of the dedication of an Addition to the Merry Lea Addition Nature Preserve in Noble County

John Bacone also presented this item. He said the tract is an addition to the Merry Lea Nature Preserve and is a large environmental complex managed by Goshen College. He said Lee Reith Corporation over the years acquired a lot of land in this area, at times assisted by The Nature Conservancy. Reith’s goal was to achieve a complex that included lakes, marshes, wetlands, uplands, and forests and to have those areas “as an environmental lab to be set aside, protected, and studied. Years ago there was a nature preserve dedicated there, and we are bringing you, as an addition, the remainder of this land that ties some of this together.” There are a lot of rare species known in the site, and “it is a nice combination of protection plus environmental education and college use”. Bacone recommended dedication of the area as an addition to the Merry Lea Nature Preserve.

Donald Ruch moved to approve the dedication of the addition to the Merry Lea Nature Preserve in Noble County. Thomas Easterly seconded the motion. Upon a voice vote, the motion carried.

DNR, DIVISION OF LAW ENFORCEMENT

Consideration of preliminary adoption of amendments to 312 IAC 5-3 governing boat races, water ski events and organized recreational activities occurring on public waters of the state; Administrative Cause No. 12-137L

Sandra Jensen, Administrative Law Judge with the Commission's Division of Hearings, presented this item. She explained the Commission gave preliminary adoption of similar rule amendments in September 2012. After the original rule proposal was granted preliminary adoption, we discovered the proposed amendments would impact another rule not considered in the original proposal. Jensen said the instant rule proposal would replace the rule package given preliminary adoption last year. "The purpose of the original rule was to add some clarity to the rules that have to do with organized boating activities and the permits that are necessary for those." The rule presented today would provide better coordination. The new rule amendment package would relocate definitions from 312 IAC 2-4-2 to 312 IAC 5-2-4.5 and 312 IAC 5-2-18.5, and essentially repeal 312 IAC 2-4. Existing language in 312 IAC 2-4 would be relocated into a new section at 312 IAC 5-3.5. "It just coordinates the two and puts them in the same place and accomplishes the same purpose that we intended to accomplish back in September. We wanted to bring it back for preliminary adoption...since the format is so completely different."

The Chair asked whether a public hearing was held regarding the original rule proposal. Jensen answered in the negative.

The Chair then observed, "There really has not been any confusion. It's a matter of making this easier?"

Jensen said, "Exactly. The original language has not been published. It has not been posted anywhere, and it's not out for public view to speak of".

The Director said, "Just so I'm clear. The language in this proposal was already preliminarily adopted. It just has been shifted and moved around. There's no new language in this that wasn't part of the preliminary adoption?"

Jensen explained the original rule took language out of 312 IAC 5-3 and amended it. "Instead of calling it 'major organized boating activity', the intent was to use the language to accommodate other things besides boating activities, because there are other things that are not necessarily boating activities that were being permitted. What we discovered was that by changing the language, it was going to impact the application of 312 IAC 2-4.... The language is completely different from what was done in September, but the purpose and application of it is going to be exactly the same as what we intended back in September."

The Director said, “The reason why I ask is that sounds to me like this probably should be reviewed by the [Office of Management and Budget] pursuant to Executive Order 13-3”.

Jensen responded the Department received OMB’s letter of exemption from Executive Order 13-3, which placed a moratorium on certain rule adoption, for the original rule package. The Department’s request for exemption was submitted under former Director Carter and was written in a general form that explained the purpose of the proposed rule amendments. She, Director Carter, and the Division of Law Enforcement reviewed the exemption request and “believed the [exemption request] was written in such a way that a new request was not necessary. Certainly, that has all shifted now.” Jensen said she would meet with new Director Clark to review the previous request. “We would meet before we go any further beyond preliminary adoption, and determine if we need to resubmit” to the OMB. “I don’t know how that affects the Commission’s interest in going forward with preliminary adoption today.”

Director Clark said, “We can discuss it, and it may not require it. But for purpose of preliminary adoption, I think we can move forward. If we deem it necessary to go through OMB, we can get that re-approved and then go forward with publication and hearings.”

Easterly asked, “Does your one year clock start on this preliminary adoption date or when you go through this process that you may or may not have to go through and actually publish something?”

Jensen responded the one year time frame for rule adoption starts on the date the Notice of Intent to Adopt a Rule is published in the INDIANA REGISTER. A Notice of Intent would not be published until the issue of OMB re-approval is addressed.

Doug Grant questioned whether the number of tournaments allowed on Lake Wawasee and Syracuse Lake were determined by the number of Saturdays and Sundays between April 1 and September 15.

Jensen said the proposed language at 312 IAC 5-3.5-11 is language that exists presently at 312 IAC 2-4. “We did not change anything there. That rule has been in place for some time, so I can’t honestly respond in terms of having any idea of where those numbers came from. All of this language that is in here...presently exists at 312 IAC 2-4, and we are not changing it.”

Davis asked whether the Department was invited in by Kosciusko County to set rules for Lake Wawasee and Syracuse Lake.

Jensen said at the time 312 IAC 2-4 was promulgated, “there would have had to have been according to the way that rule is written. But all we are doing is taking [language in 312 IAC 2-4] and moving it to a new rule section”.

Davis said, “Just speaking to Doug [Grant’s] concern, [the Department] was invited in to set rules for the lakes under this authority, and then we held public hearings.”

Jensen said, “The entire section, this old section 312 IAC 2-4 and new section 312 IAC 5-3.5, allows for individuals to petition for regulation of activities on certain lakes. I’m assuming that that’s exactly how that came to pass.”

Grant said, “I bring that up to understand. I know there has been discussion in the past, that I heard about, the number of tournaments and when they can be held. This is definitive here. It’s Saturday or Sunday. Does this cover boating activities that they do on lakes such as flotillas?”

Jensen said the permitting process includes a variety of activities such as fireworks displays, rubber duck races, and cordoning off sections for triathlons that occur on some of the public lakes, or anything that might impact boat traffic or might require restrictions of boat traffic.

Easterly noted that when reading 312 IAC 5-3.5-11, “on Saturday or Sunday you can only have this many boats. So the way [IDEM] writes [its] rules that would mean that on Tuesday you can have as many as you want, although I doubt that they would all show up.”

Davis said, “Yes. That may be right. It may be that that’s the limiter. I have to familiarize myself with the specifics.”

Jensen said 312 IAC 5-3.5-11 limits tournament permitting on Lakes Wawasee and Syracuse.

Phil French noted there are tournaments during the week in the area.

The Chair summarized the discussion, and said, “I think what I heard us say is that we are going to, if the Commission moves this forward for preliminary adoption, that [Sandra Jensen] and Director Clark will have a conversation” regarding whether to re-submit a exemption request for the instant proposed rule package to OMB.

Jensen agreed with the Chair’s summarization of the discussion. “I will make certain that everyone is comfortable with the moratorium exception”.

Thomas Easterly moved to give preliminary adoption to amend 312 IAC 5 governing boat races, water ski events and organized recreational activities on public waters of the state, with repeal of 312 IAC 2-4. Vice Chair Stautz seconded the motion. Upon a voice vote, the motion carried.

DNR, DIVISION OF FISH AND WILDLIFE

Request for preliminary adoption of new rules in 312 IAC 9.5 to establish an option for an in-lieu fee to mitigate adverse impacts to fish, wildlife, or botanical resources for activities authorized by a permit issued by the Division of Water under IC 14-16-2, IC 14-28-1 or IC 14-29-1; Administrative Cause No. 13-088W. Review of and possible action on proposed nonrule policy document providing standards for administration of in-lieu fee; Administrative Cause No. 13-107W

Linnea Petercheff, Staff Specialist in the Division of Fish and Wildlife, presented this item. Proposed 312 IAC 9.5 would establish an option for mitigation for permits for construction in a

floodway, public freshwater lakes, and navigable water. State statutes require review of permit applications for impacts to fish, wildlife, and botanical resources. She explained the Department receives mitigation plans that indicate how the habitat will be restored or established to mitigate for the loss as a result of a project. Typically, mitigation is done on or near the project site or at least in the watershed. Three options for mitigation would be available at 312 IAC 9.5-2-4. The first option is the permit applicant would provide mitigation on the project site as is the current practice. The second option is the permit applicant would use an approved mitigation bank. In the third option, the applicant would provide payment of an in-lieu fee. “The in-lieu fee option would allow an applicant to submit payment to the Indiana Natural Resources Foundation to serve as the mitigation. Those funds would be used to establish or restore habitat for fish and wildlife resources.” Petercheff noted other states, such as Kentucky and North Carolina, already have an in-lieu fee program, to mitigate for permits through the U.S. Army Corps of Engineers. “INDOT is also interested in this. [It is] working with the Corps. IDEM and our staff right now are in the process that Director Clark mentioned earlier with the RFP and the instrument that the Corps requires for its in-lieu fee option.”

Petercheff said applicants who would be approved for in-lieu fees would be required to submit an amount that would be approved by DNR. The Department has drafted a nonrule policy which would list fees for each habitat type and each region. “Since this is a new program in Indiana, we do not want to put the fees in the rule, but we wanted to place them in a policy to provide some flexibility as we get started.” The draft nonrule policy in the Commission’s packet would provide additional details about program administration and would give examples of the criteria used to determine how the funds would be spent. The draft nonrule policy lists nine natural regions and would be presented to the Advisory Council for further review. An amended nonrule policy document, which including the fees, would be brought before the Commission for approval at a later meeting. Petercheff said the DNR requested preliminary adoption of the proposed 312 IAC 9.5. The Commission could also approve the draft nonrule policy document.

Petercheff said the proposed rule would provide in-lieu fee as one option, “but not the primary option, but simply one option for applicants for these DNR permits. We still want them to try to do the mitigation onsite, but they would also have the mitigation bank as another option.”

The Chair asked Petercheff to clarify the Department’s request regarding the proposed rule and nonrule policy document.

Petercheff responded the DNR is asking the Commission to give preliminary adoption to proposed 312 IAC 9.5. She said the draft nonrule policy document is a working document. The Commission could approve the policy document today, or it could be considered for approval at a later date with the draft nonrule policy document “considered as background information to see how we plan to incorporate this program in the future”. Either way, fees would be added later.

John Davis said the preliminary adoption that the Department is asking for today is a rule...that sets the framework for allowing the Department to do offer an in-lieu fee. Davis added the DNR is seeking preliminary adoption of 312 IAC 9.5 today. The Department will request the Commission to approve a nonrule policy at a later date. “Here is a draft” of the nonrule policy document. “But I would prefer that you didn’t [approve] it today. I would rather have

you...read it to understand the process and comment back to us as soon as you feel comfortable doing that on whatever issue there is.” Davis added, “We are going to stress again and again that we are not replacing ‘avoid, minimize, and mitigate’, the kind of ‘golden rule’ of disturbance of sensitive areas.... But when you mitigate, you would also have an in-lieu fee option.”

Patrick Early reported the Advisory Council discussed the proposed rule, and “to our group, the concept seems really solid. You’re not telling them they can’t do the mitigation themselves. You are giving them the option of not doing the mitigation themselves if they are willing to pay this in-lieu fee. I think it [allows the Department] to be a lot more strategic about the way we do reclamation and probably do bigger projects, pooling them together in some ways. Of course, decisions need to be made about how you actually make those decisions.” He said the biggest concern for the Advisory Council was the determination of the fee. “When [the Advisory Council] talked about it..., the first the idea was to allow the contractor to propose the fee themselves, and we decided that would be a disaster.... We are trying to figure out what the right way is to come up with the fee. How do you decide what that amount is?” An applicant who was not satisfied with the amount of an in-lieu would have the option to complete the mitigation itself. The Advisory Council “thinks the in-lieu fee is a really good idea, and it seems like it is going in the right direction.... Preliminarily adopting at least the rule would be a good idea..., and it makes sense” to defer approval of the nonrule policy document for further review.

Thomas Easterly said, “I want to make sure that this is the first step, because we are trying to do that other in-lieu program that Cam [Clark] talked about a few minutes ago. I was shocked that you can use this for wetlands mitigation. I do understand that we need to bite off a little piece at a time, but we need to somehow legalize a similar program when we finish that other process.”

Davis agreed. He said DNR, INDOT, and IDEM met recently, and processes are moving along parallel lines. “This is the first step for us. We know that we would be simpler, but we also knew we had to be able to fit into what we decide on the bigger one.” The parallel in-lieu program requires agreement from the U.S. Army Corps of Engineers. “We are hiring a consultant, and of course, the Louisville Corps Office has already agreed to a Kentucky plan. That’s a real leg up, it seems like.”

Donald Ruch asked, “Is it possible that through this in-lieu fee that we could lose acreage, in that, they pay a fee, and we use that to enhance existing wetlands, for example, at the cost of producing new wetlands?”

Davis said, “I don’t think there will not be a net loss because that comes from that other process, that Federal process.... Every time that someone replaces, they do give credit for an enhancement. One theory is you could take something that wasn’t a bottomland hardwood forest and turn it into that, and you wouldn’t have a net gain of acreage, but you would have a net gain of a certain kind of acreage.... We are also talking about one of the advantages of [the in-lieu fee] is you can pool money. A little disturber could pay some dollars and another little disturber and then we could do a bigger or more a more meaningfully or more strategically placed project. It will be very difficult to not only balance the dollars that have come in for a disturbance versus the outgo in that particular watershed and the replacing the function of what we are trying to

replace if we also add an acreage calculation. That's what we are talking about. How do we buffer all those different influences?"

Easterly said, "Sometimes people agree to do the projects and then they don't. Yes, you can go through enforcement and get an order, but you still don't have the thing on the ground. At other times, they do, do them, but they weren't well thought out. They don't really provide the value that DNR's management will provide to these projects."

Barb Simpson, Executive Director of the Indiana Wildlife Federation ("IWF"), commented that the in-lieu fee programs "can be very good.... From our point of view, they are very helpful and the trick is to do them right. One of the key pieces to do them right is to make sure that the fees charged adequately cover the entire fully-loaded costs." An in-lieu fee program supports reduction of habitat fragmentation. "We are very much in favor of this if it is done right." She noted the proposed rule needs to be clarified. The Commission should make clear the in-lieu fee is "not the first choice. This program needs to be the last choice, if possible." The IWF is concerned fees will be set "so low to make it simpler for business to progress that, in fact, we can't really get the job done. It'll be the first choice and will be used as an easy out." The agency needs to think through why a proposed in-lieu fee would be accepted or rejected "to make sure that we don't have too low of barrier to reject it or allow it."

Simpson said the Kentucky in-lieu fee program was initiated due to "valley-fill" occurrences when "coal companies would fill in an entire valley and wipe out an entire stream. There's lots of money involved in those in-lieu mitigation programs. Our situation is a little bit different. If we look at the details of Kentucky and see a lot of money, I'm not sure that there will be that much money in it for us, but is still a good program to do."

Simpson said that the IWF supports the Division of Fish and Wildlife administration of the in-lieu fee program. "Those folks have the expertise. They know how to do these programs." But the Division of Fish and Wildlife is funded through hunter and angler license fees. She cautioned that with the additional administrative responsibility associated with the in-lieu fee program, the program should be fully staffed, independent, and not drain on the Division's resources.

Referring to 312 IAC 9.5-3-1(c)(2), Simpson noted watersheds designated as HUC-8 (hydrologic unit code) are "pretty big watersheds.... What we are concerned about is we wouldn't want to have...mitigation issues in the northeastern part of the State and, in fact, we are going to fix it down in the southwestern part of the State. I think we have to watch...how we balance consolidation or not."

Simpson concluded, "Make sure the fee is high enough." Incorporate the fee structure in a nonrule policy document. Contingency fees should be reviewed. "Restorations and mitigations notoriously fail. It is very hard to get them right when you're talking about stream and wetland restoration. You have to build in enough contingency fee to take care of that. Some States start out at 5%, but they always end up around 20%. It just takes that kind of money to do it." She said she also was not clear on the program's impact to IDEM.

Tim Maloney, with the Hoosier Environmental Council (“HEC”), said HEC also supported the proposed rule. But HEC “wants to make sure that an in-lieu fee program provides an effective mechanism for replacing the types, amounts, and functions of the resources lost”. The level of fees charged should fully administer the program in terms of administration cost and staff. The Indiana Natural Resources Foundation and the Division of Fish and Wildlife should have sufficient resources and capacity to administer the program properly “in that we don’t just end up with fees collected and not having the ability to follow through and make sure that mitigation projects go forward”. HEC wants to reinforce the “golden rule—the idea of sequencing and evaluating projects and any mitigation that may be required for those projects, in that, compensatory mitigation is farther down in the sequence after the avoidance of impacts and minimization of impacts. If those two goals can’t be achieved, then we compensate for the impacts.” He also recommended the proposed nonrule policy document be an amendment to the existing Commission nonrule policy document, Floodway Habitat Mitigation (Information Bulletin #17 (Second Amendment); 20120801-IR-312120434NRA) “so that linkage between the overall implementation of compensatory mitigation is recognized in the guidance for this particular in-lieu fee mitigation proposal”.

The Chair stated, “I think this issue has been well-discussed. I know the Advisory Council spent a lot of time reviewing this, and there will be more time to come.” He then recommended a motion be made for preliminary adoption of the rule amendments as proposed, and to table further action on the proposed nonrule policy document for reconsideration by the Commission at a later date.

Vice Chair Stautz noted the draft nonrule policy document indicates at Section 3 a review team will be established. “It may be helpful if [the Department and the Indiana Natural Resources Foundation] can think through membership terms, representation on that, and the different groups as they look at the nonrule policy document.”

Patrick Early moved to give preliminary adoption to 312 IAC 9.5 to establish an option for an in-lieu fee to mitigate adverse impacts to fish, wildlife, or botanical resources for activities authorized by a permit issued by the Division of Water under IC 14-16-2, IC 14-28-1 or IC 14-29-1. Thomas Easterly seconded the motion. Upon a voice vote, the motion carried.

NRC, DIVISION OF HEARINGS

Consideration of report on rule processing, public hearing, hearing officer analyses, and recommendation regarding final adoption of proposed rule, 312 IAC 20-4-11.5, establishing dual review of projects subject to review under 16 U.S.C 470f and IC 14-21-1-18 ; LSA Document #13-3(F); Administrative Cause No. 11-137H

Jennifer Kane, Hearing Officer, presented this item. IC14-21-1-18 provides that an historic site or historic structure owned by the state or that is listed on the state or national register may not be altered, demolished, or removed by a project funded, in whole or in part, by the state unless the Historic Preservation Review Board has granted a certificate of approval. The Federal counterpart to Indiana’s statute, 16 USC 470f, also requires, prior to licensure approval and

expenditure of Federal funds, a review (what is commonly called Section 106 Review) of any impacts of an activity on any historic district, site, building, structure or object that is included or eligible for inclusion in the National Register. Kane explained State-law review and Section 106 review seek to accommodate historic preservation concerns with the needs of State and Federal activity. The goal of state and federal review is to identify historic properties potentially affected by the activity, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties. She said the rule amendment would provide an opportunity for an applicant to request the DNR's Division of Historic Preservation to coordinate, into a single process, the reviews required by state statute and federal regulation. The proposal would streamline and support administrative efficiency regarding what can be redundant project reviews, but Kane noted that it would not be mandatory to combine these reviews. At 312 IAC 20-4-11.5 the rule would also provide that the Director of the Division of Historic Preservation and Archaeology may issue a letter of clearance to INDOT for a qualified bridge project.

Kane noted that after distribution of the Hearing Officers' Report, in reviewing the rule proposal, she recommended to amend further the proposed language that was posted to the INDIANA REGISTER. Kane said Section 106 refers to a section within the Historic Preservation Act. She recommended, for proper citation form, the removal of the language "Section 106 of" in subsections (d)(1), (e), and (g). For clarity, the citation to the federal review requirement should simply read "16 USC 470f". Kane noted that the amendment would be technical, and would not cause any substantive changes to the rule. Kane recommended the Commission give final adoption of the proposed rule, with the modification of the Federal citation, 16 USC 470f.

Thomas Easterly moved to give preliminary adoption of new rule 312 IAC 20-4-11.5 to establish a dual review of projects subject to review under 16 U.S.C 470f and IC 14-21-1-18, as amended. Vice Chair Jane Ann Stautz seconded the motion. Upon a voice vote, the motion carried.

Consideration on rule processing, public comments, analysis and recommendation regarding final adoption of miscellaneous amendment to 312 IAC9, rules governing fish and wildlife; LSA Document #12-670(F); Administrative Cause No. 12-184D

Sandra Jensen, Hearing Officer, presented this item. The proposal makes amendments to various section of the 312 IAC 9, rules governing fish and wildlife. Two public hearings were conducted, and only six adults appeared. "Despite the lack of participation at the public hearings, we did have a number of comments that came in by regular mail and through the Internet form." The vast majority of the public comments pertained to the proposed amendments to the rules governing deer hunting, particularly the proposed addition of a primitive muzzleloader season at 312 IAC 9-3-4(i) and the lengthening of the archery season at 312 IAC 9-3-4(c), which would have allowed the season to begin on September 15 instead of October 1. She noted there was a limited amount of support, but the vast majority of the comments indicated opposition to both proposed amendments. Comments were also received regarding the proposed amendment at 312 IAC 9-3-3(b)(5) with respect to the prohibition on the use draw lock devices on more traditional archery now that crossbows are allowed in the existing archery season.

Jensen said the Department responded to citizen comments with a recommendation the proposed primitive muzzleloader season be withdrawn (312 IAC 9-3-4(i)), as well as the proposed

extension of the archery season (312 IAC 9-3-4(c)). The prohibition of the draw lock devices should be modified such that draw lock devices would be allowed on traditional archery equipment at least during the part of the season that crossbows are allowed (312 IAC 9-3-3(b)(5)). “If, in fact, that archery season is not extended then that would be the entirety of the season.” DNR’s proposed revisions are supported by the public comments. “It is my opinion—which of course this is subject to review by others above me—the revisions would be a logical outgrowth of the rule as it was originally published. At least in that respect, I believe the revisions can be made without any difficulty or jeopardizing of the rule as a whole.” She noted the discovery of a citation error at 312 IAC 9-4-7(s), which reads “50 CFR 20”, but should be amended to read “50 CFR 21”.

Jensen said she attached exhibits to the Hearing Officer’s Report to reflect proposed rule package language incorporating all or some of the additional recommended revisions. The withdrawal of proposed amendments to add a primitive muzzleloader season and the extension of the archery season at 312 IAC 9-3-4(i) and 312 IAC 9-3-4(c), respectively, requires contemporaneous changes in other rule sections that are better shown on paper. All tendered exhibits include the revision to eliminate the prohibition of the use of draw locks and the corrected CFR citation.

- Exhibit D: The rule language as originally proposed, and including the recommended revision to 312 IAC 9-3-3(b)(5)(A) and 312 IAC 9-4-7(s). This version will leave intact the originally proposed establishment of a primitive muzzleloader season and the extension of the archery season.
- Exhibit E: The original rule language at 312 IAC 9-3-2, 312 IAC 9-3-3 and 312 IAC 9-3-4 as revised to effect the recommended revision at 312 IAC 9-3-3(b)(5)(A) as well as the withdrawal of only the primitive muzzleloader season.
- Exhibit F: The rule language as originally proposed, as well as incorporating the recommended revision to 312 IAC 9-3-3(b)(5)(A) as well as revisions to 312 IAC 9-3-3 and 312 IAC 9-3-4 as necessary to withdraw only the extended archery season.
- Exhibit G: The rule language as originally proposed with incorporation of recommended revision to 312 IAC 9-3-3(b)(5)(A) as well as revision of the proposed rule language at 312 IAC 9-3-2, 312 IAC 9-3-3 and 312 IAC 9-3-4 to complete the withdrawal of both the primitive muzzleloader season and the extended archery season.

Jensen said the rule proposal was ripe for consideration as to final adoption.

The Chair thanked Jensen for well-ordered presentation. “This is a matter that has received quite a bit of attention.” He recommended a motion be made to give final adoption to the proposed rule language as presented in Exhibit G.

Easterly stated, “We are trying to increase the harvest of deer, and then I read that eliminating these two things do not affect deer management. It doesn’t matter?”

Mark Reiter, Director of the Division of Fish and Wildlife, responded the additional days and season as was proposed would be used very lightly by hunters, and this additional opportunity

would not contribute significantly to the harvest of deer. Half the deer reported are taken during the first weekend of firearm season.

The Chair added, “This purely became a social issue and not a management issue. It was overwhelming from the response. I think it is our job, as the Commission, at this point to be efficient and responsive.”

Jack Corpuz, from Pheasants Forever, stated that he supported the proposed amendments to the ring-necked pheasant season and the quail season. “We see no biological difference in shifting those seasons. There will be some societal backlash, particularly with the quail, but for the most part we see no biological effects that will harm this particular area.”

Corpuz added, “Taking off my Pheasants Forever hat, as a longtime bow hunter and longtime muzzleloader, I agree with Mark [Reiter] you would see less than 1,000 animals from those two extra seasons. It’s not going to be a management issue.”

Bill Herring stated, “I wholeheartedly support the recommendation of the DNR Division of Fish and Wildlife that the early archery start be withdrawn, and that the late muzzleloading primitive season be withdrawn. I have long thought that if we can’t get the hunting that we need to get done between October 1 and first Sunday in January, then we need to make some other changes. If we need to take out more deer and reduce the deer population in certain areas, we have tools to do that.” He said there were approximately 10,000 deer taken during the late antlerless deer season which was instituted last year. DNR has the tools within the timeframe of October 1 through the first Sunday in January to effectively manage the deer herd. “The disadvantage of starting a season in September statewide is that it takes away from the unique nature and the incentive of more people to get out there with the youth to get them involved in deer hunting because the youth season is generally the last weekend in September. To have a statewide season overlap that I think is not the right thing to do.” He said urban archery season begins September 15. “One of the ideas, I think, for starting that...was to encourage seasoned hunters to be direct in their focus towards the areas that DNR, and others have said, ‘We need to reduce the deer population.’ If you have a statewide season starting September 15, you sort of dilute that effort because people wouldn’t be so inclined to go into that targeted area. They would go into their favorite area.”

Patrick Early moved to give final adoption of amendments to the 312 IAC 9 as presented in Exhibit G. Donald Ruch seconded the motion. Upon a voice vote, the motion carried.

Consideration for recommendation of final action on readoption of 312 IAC 25 governing surface coal mining and reclamation; LSA #13-125(F); Administrative Cause No. 13-007R

The Chair announced this item withdrawn.

Adjournment

The meeting was adjourned at approximately 11:35 a.m., EDT.

Next Scheduled Meeting:

September 17, 2013 (10:00 a.m., EDT (9:00 a.m., CDT)), Ballroom, The Garrison, Fort Harrison State Park, Indianapolis